(18)

No. 85-495

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,

Petitioners,

v.

RONALD PHILBROOK,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League), pursuant to Rules 36.3 and 42 of the Rules of this Court, moves for leave to file the appended brief amicus curiae in this matter.

The League is a voluntary non-profit organization dedicated to the right to religious freedom and the right to life of all, born or pre-born. The League is especially interested in helping insure the American people's continued enjoyment of religious freedom in employment. To this end the League has filed amicus curiae briefs before this Court in its most recent considerations of the Free Exercise Clause in employment, *Goldman v. Weinberger,* 106 S. Ct. 1310 (1986) and *Hobbie v. Unemployment Appeals Commission,* No. 85-993. Although this case is controlled on a statutory rather than constitutional basis, this brief is another expression of the League's interest.

The League will address the two questions of law raised by this case, whether the court of appeals properly found a prima facie case of religious discrimination in employment and whether the court of appeals correctly applied Title VII's religious accommodation provisions. Although these issues will likely be considered by all parties, it is probable that these parties may not present these matters from the general perspective of a desire to preserve religious freedom in employment which motivates the League. The need for briefs of this nature supporting Ronald Philbrook is especially acute since several amicus curiae briefs have been filed in support of the Board of Education by powerful interest groups representing organized labor and management. These briefs have been filed in support of the Board of Education with the consent of both parties, while the Attorney for the Board of Education and certain individual defendants has apparently arbitrarily withheld consent for the League to file a brief supporting the opposite party, Ronald Philbrook.

This motion is necessitated by the afore-mentioned refusal of the attorney of record for the Board of Education and the

allied individual defendants to grant the League consent to file the appended brief amicus curiae. The attorney of record for Ronald Philbrook has granted such consent. The attorney of record for the labor union and other individual plaintiffs has not responded in any fashion to the League's request for consent to file. The originals of the letters from counsel of record for Ronald Philbrook consenting to the filing of this brief and the counsel of record for the Board of Education and the allied individual defendants refusing such consent have been filed with the Clerk of this Court.

For the foregoing reasons, the League moves for leave to file the appended brief amicus curiae.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of amicus curiae is contained in the Motion for Leave to File Brief Amicus Curiae attached to this brief.

SUMMARY OF ARGUMENT

The court of appeals correctly determined that Ronald Philbrook established a prima facie case of religious discrimina-

tion. The court of appeals' decision on this point is founded upon the central premise that Title VII's language explicitly prohibits religious discrimination in compensation, terms, conditions or privileges of employment in the same manner that it prohibits religious discrimination in hiring or discharge. The protection plainly offered by the language of Title VII, 42 U.S.C. §§ 2000e *et seq.*, is also consistent with legislative history.

The only major decision suggesting that a compensation deprivation might be insufficient injury for purposes of a Title VII prima facie case of religious discrimination is *Pinsker v. Joint District Number 28J,* 735 F.2d 388, 391 (10th Cir. 1984). However, the reasoning in the *Pinsker* suffers from two basic defects. First, the decision does not accord proper significance to Title VII's prohibition of religious discrimination in compensation, terms, conditions and privileges of employment. Second, the decision fails to accord the Title VII prima facie case of religious discrimination its proper role as a relatively easily surmountable preliminary barrier for a Title VII plaintiff to scale before a court reaches questions such as reasonableness of a religious accommodation or the hardship of such an accommodation. The excessively onerous prima facie case required by the *Pinsker* court effectively results in an improper premature consideration of matters such as the reasonableness of a religious accommodation and undue hardship of such an accommodation which are appropriately determined at later stages of the Title VII analysis. Thus, the court of appeals below applied the test for determining a prima facie case of religious discrimination in a matter which implemented Title VII in a far more appropriate fashion than the court in *Pinsker.*

Although the facts in this case do not evidence the bilateral cooperation between employer and employee which is the ideal means of reaching a religious accommodation under Title VII, the court of appeals application of Title VII's reasonable accommodation of religion and undue hardship provisions was appropriate under these facts.

Congress clearly intended that religious accommodations

be reached through a process of bilateral cooperation between employee and employer. This intent is reflected both in legislative history and judicial cases. Congress' desire for bilateral cooperation means that neither an employer or an employee may stubbornly insist upon a single accommodation and refuse serious consideration of alternatives. Under this policy of bilateral cooperation it is certainly improper for an employer to insist that such cooperation cease the moment the employer proposes an accommodation which could be reasonable under the statute.

Occasionally, cases will occur, like this one, in which a religious accommodation is not reached through bilateral cooperation. In such a case, absent special circumstances or undue hardship to the employer, the employee should receive the religious accommodation which least penalizes the employee's religious observance. In such circumstances a more onerous employer-proposed accommodation would actually be an employment practice which discriminates on a religious basis when compared with a more favorable employee-proposed accommodation. This approach conforms to the EEOC's guidelines on this issue.

The proposed approach also does not penalize the employer. The employer remains free to utilize the process of bilateral cooperation to work out any policy which will satisfy the interests of both parties. Even more importantly, the expansive definition of "undue hardship" established in this Court's decision in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 79-85 (1977), guarantees that the employer will suffer no more than de minimis cost or inconvenience as a result of any required religious accommodation.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY DETERMINED THAT PHILBROOK ESTABLISHED A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION.

The court of appeals' proper determination that Ronald

Philbrook established a prima facie case of religious discrimination was centered upon its conclusion that: "Title VII prohibits not only discrimination in hiring and firing but also discrimination 'with respect to compensation, terms, conditions or privileges.' " *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 483, *reh'g. denied*, __ F.2d __ (2d Cir. 1985), *cert. granted*, 106 S. Ct. 848 (1986) (No. 85-495). Based upon this interpretation of Title VII, 42 U.S.C. §§ 2000e *et seq.*, the court of appeals determined that the more clearly discriminatory choice between one's job and religious beliefs "cannot be distinguished from the choice here between giving up a portion of [one's] salary and [one's] religious beliefs."[1]

The court of appeals' position that Philbrook established a prima facie case of religious discrimination properly reflects congressional intent that the religious discrimination provisions of Title VII protect employees from any penalization in terms or conditions of employment based upon religious grounds. As was noted above, the court of appeals correctly found this congressional intent reflected in the language of Title VII's religious discrimination provision which explicitly covers religious discrimination with respect to compensation and other conditions of employment as well as hiring or discharge. The congressional intent to protect religious discrimination in less severe forms than refusal to hire or discharge

[1] 757 F.2d at 482-83. There can be little dispute that Philbrook established two of three required elements of a prima facie case of religious discrimination, holding a bona fide religious belief conflicting with an employment requirement and informing his employer of this belief. Thus, the only real issue is whether the injury Philbrook suffered constitutes the type of injury or "discipline" necessary for a prima facie case of religious discrimination to be established under the controlling court of appeals' precedents. *See Philbrook*, 757 F.2d at 481; *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) (setting out elements of prima facie case of religious discrimination).

reflected in Title VII's clear language is also consistent with its legislative history. In proposing the 1972 religious discrimination amendment to Title VII, Senator Randolph was obviously most concerned with the very serious situations in which an employee suffered religious discrimination in hiring or discharge. *See* Cong. Rec. 705-706 (1972). However, a fair reading of this legislative history reflects a consistent desire to thoroughly protect religious observance. It contains nothing which would negate Title VII's explicit textual prohibition of religious discrimination in forms less severe than refusal to hire or discharge.

It is clear that the court of appeals properly determined that forms of religious discrimination less severe than refusal to hire or discharge can establish the requisite injury to raise a prima facie case of religious discrimination under Title VII. The only major decision with which this view might appear to conflict is *Pinsker v. Joint District Number 28J*, 735 F.2d 388, 391 (10th Cir. 1984), in which the United States Court of Appeals for the Tenth Circuit held that a religiously motivated employee did not establish a prima facie case of religious discrimination in a situation in which the employer afforded a limited number of personal leave days and required additional religious holidays to be taken on an unpaid basis.[2]

However, the reasoning in the *Pinsker* case suffers from two basic defects. First, unlike the court of appeals below, the *Pinsker* court failed to properly come to grips with Title VII's language prohibiting discrimination in compensation, terms, conditions and privileges of employment. It cannot be seriously disputed that some deprivation on these bases occurred in both the instant case and the *Pinsker* case as a result of the involved employees' religious observances. It further cannot be disputed that the language of Title VII literally protects against such deprivation. Accordingly, the *Pin-*

[2] However, an argument can be made that the availability of personal leave days for both religious observance and secular observance in *Pinsker* distinguishes that case from this one in which the employer has refused to make personal leave days available for religious observance.

sker court's reasoning appears out of step with the clear language of Title VII.

This difficulty leads into the second major problem with the *Pinsker* court's reasoning. Again unlike the court of appeals below, the *Pinsker* court failed to accord the Title VII prima facie case its proper analytical role as a relatively easily surmountable preliminary barrier for a Title VII plaintiff to scale before a court reaches questions such as the reasonableness of a religious accommodation or the hardship of such an accommodation. The appropriate limited role of a Title VII prima facie case is reflected in such decisions of this court as *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 252-256 (1980) and *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800-805 (1973). As this Court noted in *Burdine:* "The burden of establishing a prima facie case of disparate treatment is not onerous." 450 U.S. at 253. However, in requiring a qualitative injury greater than loss of pay the *Pinsker* court appears to have created an unduly onerous requirement for proof of a prima facie case. In effect, the court prematurely injected itself into an analysis of matters such as the reasonableness of the employer's accommodation of the employee's religious beliefs and the question of whether accommodation would cause the employer undue hardship. Certainly, there are proper points in a Title VII analysis at which these matters are to be considered. However, the *Pinsker* court's effective determination of such issues at the prima facie case stage distorts the Title VII religious discrimination analysis by prematurely considering matters properly weighed during later phases of this analysis.

Thus, the court of appeals correctly determined that Philbrook's loss of pay constituted the "discipline" on a religious basis necessary to establish a prima facie case of religious discrimination under Title VII.

II.

IN LIGHT OF THE FACTS INVOLVED THE COURT OF APPEALS PROPERLY APPLIED TITLE VII'S REASONABLE ACCOMMODATION OF RELIGION AND UNDUE HARDSHIP PROVISIONS.

In light of the less than ideal degree of cooperation between Philbrook and the Board of Education in working out a religious accommodation, the court of appeals appears to have applied an appropriate analysis of the issues of reasonable accommodation of religion and undue hardship to the employer in reaching its decision.

A. Congress Intended that Reasonable Accommodations of Religion should Evolve from Bilateral Cooperation between Employee and Employer.

An examination of the legislative history surrounding the 1972 religious discrimination amendments to Title VII reflects Congress' intent that the determination of a suitable accommodation of an employee's religious beliefs should result from bilateral cooperation between employer and employee. For example, Senators Randolph and Williams had the following exchange concerning the manner in which Congress would prefer a reasonable accommodation to be made at the time Congress considered the 1972 religious discrimination amendments:

> MR. WILLIAMS. The Senator and I are employers. As a matter of practice, we recognize the days of religious observations of some of our staffs, even though they are regular working days, generally, of the Senate, its committees, and its officers.
>
> MR. RANDOLPH. That is correct. I know of many instances of that kind. I think that usually the persons on both sides of this situation, the employer and the employee, are of an understanding frame of mind at heart. I do not think they try to present problems. I do not think they try to have abrasiveness come into these decisions. I think they are just building upon conviction, and hopefully, understanding and a desire to achieve an adjustment; and if in perhaps a very, very small percentage of cases this is not able to be accomplished, that should not deter the Senate in its action in approving this amendment.

118 Cong. Rec. 706 (1972).

The same desire for bilateral cooperation in working out employees' religious accommodation has pervaded court decisions. For example, the United States Court of Appeals for the Fifth Circuit in *Brener v. Diagnostic Center Hospital,* 671 F.2d 141, 145-146 (5th Cir. 1982) appeared to approve of a process by which an employer would seriously consider an employee's proposed accommodations as well as his own. However, the clearest case in which a court of appeals noted the necessity for bilateral cooperation in successfully establishing reasonable accommodation is *Chrysler Corp. v. Mann,* 561 F.2d 1282 (8th Cir. 1977), *cert. denied,* 434 U.S. 1039 (1978). There the United States Court of Appeals for the Eighth Circuit specifically noted that:

> A mutuality of obligation exists in the employee-employer relationship. Title VII does not supplant this mutuality, but, using it as a necessary background, simply adds detail to certain areas of the relationship which are to remain free of discrimination. 42 U.S.C. § 2000e(j) thus has little meaning if it is considered only at an abstract level apart from the complementary nature of the duties that employer and employee owe one another, for a successful accommodation will rarely be possible unless employer and employee make mutual efforts. *A failure of cooperation by either party will certainly lessen the chances of achieving a reasonable accommodation.*

Id. at 1285 (emphasis added). *See also American Postal Workers Union, San Francisco Local v. Postmaster General,* 781 F.2d 772, 776-777 (9th Cir. 1986) (calling for bilateral cooperation in achieving religious accommodation).

Clearly, Congress envisioned that Title VII's religious accommodation provisions required employers and employees to cooperate for their successful implementation. This means that an employee may not doggedly refuse to cooperate with an employer's efforts to reasonably accommodate his religious beliefs. Conversely, this also means that, absent undue hardship, an employer may not stubbornly adhere to its

established employment policies and refuse to consider deviations from such policies which would better accommodate the involved employee's religious beliefs. In this case it would appear that the Board of Education has inflexibly insisted upon adherence to its leave policy and has refused serious consideration of any alternatives. Such a failure to engage in bilateral cooperation is exactly what Title VII's religious accommodation provisions were designed to prevent. Title VII quite simply does not envision a "reasonable accommodation" being achieved outside the process of mutual bilateral employee-employer cooperation. It most certainly does not contemplate bilateral consideration of a proper reasonable accommodation of religion ending the moment an employer proposes an accommodation which could be held reasonable under the statute. Accordingly, the failure of an employer or employee to mutually and flexibly cooperate with its counterpart in achieving a reasonable accommodation, such as the Board's failure to cooperate with Philbrook, results in a situation in which Title VII's religious accommodation provisions have not been implemented in the manner most consistent with Congress' intent.

B. In Light of the Absence of Bilateral Cooperation in this Case, the Court of Appeals Properly Determined that the Board of Education should be Required to Provide Philbrook with the Reasonable Accommodation which Least Penalizes Philbrook's Religious Observance without Causing the Board of Education Undue Hardship.

While an employee's religious observances are to be reasonably accommodated, absent undue hardship to the employer, an accommodation is not ideal if it has been reached outside the process of bilateral cooperation between an employee and employer. However, when bilateral cooperation is absent an accommodation must still be worked out.

In such a circumstance one will often be confronted by an employer and employee who propose alternative accommodations. In choosing between alternative accommodations it would seem that Title VII's literal language would call for the accommodation which, absent undue hardship to the em-

ployer, would least penalize the involved employee's religious observance. In such a case a more onerous employer-proposed "accommodation" would actually be an employment practice which discriminates on a religious basis when compared with a more favorable employee-proposed accommodation. Although the bilateral cooperation and flexibility encouraged by Title VII's religious accommodation provision indicate that exceptions to such a general rule should be permitted to implement Title VII's purposes, it would seem that the statute's purpose of preventing religious discrimination in employment would ordinarily be best furthered by implementing the accommodation which, while avoiding undue hardship, most fully prevents the penalization of an employee for religious observance.

This approach conforms with the Equal Employment Opportunity Commission's guidelines on this question. These guidelines require that:

> (2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered was reasonable by examining:
>
> (i) The alternatives for accommodation considered by the employer or labor organizations; and
>
> (ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

29 CFR § 1605.2(c)(2) (1985). The EEOC's guideline properly implements Title VII by envisioning bilateral cooperation in achieving an agreement, but by generally calling for the implementation of the accommodation which, absent undue hardship, least disadvantages the employee with respect to his or her employment opportunities.[3] Although not dispositive of Title VII's interpretation, these guidelines are certainly entitled to some weight in determining the proper application of the statute's religious accommodation provisions. *See General Electric Co. v. Gilbert,* 429 U.S. 125, 140-142 (1976); *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-434 (1971). Further, in this area the EEOC's guidelines should be given especially significant weight because of Congress' intent to give the EEOC great flexibility in determining whether an employment practice interferes with religious observance.[4]

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[3] In *American Postal Workers Union, San Francisco Local v. Postmaster General,* 781 F.2d 772, 776-777 (9th Cir. 1986) the United States Court of Appeals for the Ninth Circuit used a similar, but slightly different, approach. Under the court's suggestion an employer's accommodation would be implemented if, measured objectively, it reasonably preserved an employee's employment status. However, if the accommodation did not reasonably preserve this status the employee's proposal would need to be implemented if it did not cause undue hardship. This method is inferior to those suggested by the court of appeals below and the EEOC for two reasons. First, the Ninth Circuit's approach substitutes a fairly rigid system of implementation of employer and employee accommodations for free flowing bilateral cooperation. Second, the Ninth Circuit's approach does not provide an opportunity for the agency or judicial comparison between suggested accommodations which is necessary to truly insure that no employment opportunity will be deprived on the basis of religious observance.

[4] This exchange between Senators Dominick and Randolph prior to the enactment of the 1972 religious accommodation amendments illustrates the discretion and flexibility Congress intended to give the EEOC in this area:

> MR. DOMINICK. I thank the Senator. I think this amendment will be helpful. All of these various situations keep arising because of our pluralistic method of conducting our business in this country.

This approach does not prejudice the employer. The employer remains free to engage in bilateral cooperation to work out any policy which will satisfy the interests of both parties and avoid any significant litigation. Further, if an employee does not engage in such bilateral cooperation with the employer, this failure to cooperate may prevent him from achieving a satisfactory religious accommodation through the EEOC or the Courts. *See American Postal Workers Union,* 781 F.2d at 776-777; *Brener,* 671 F.2d at 145-146; *Chrysler Corp.,* 561 F.2d at 1285.

Even more significantly, however, the employer can utilize the expansive definition of "undue hardship" established in this Court's decision in *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 79-85 (1977); to insure that it will suffer no more than de minimis cost or inconvenience as a result of any required religious accommodation. *Hardison*'s broad interpretation of "undue hardship" means that an employer should never suffer any significant financial or other difficulty from accommodating an employee's religious ob-

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It is hard to foresee far enough ahead so that each specific type of case can be anticipated.

Am I correct in understanding that the amendment allows flexibility both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered with? In other words, flexibility is provided so that someone could make a discretionary judgment?

MR. RANDOLPH. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment, that there would be such flexibility, there would be this approach of understanding, even perhaps the discretion, to a very real degree.

I agree with the Senator's feeling, and I am sure that that is what is meant and would flow from the adoption of the practice under the amendment.

118 Cong. Rec. 706 (1972).

servances.[5] While reserving ultimate decision on this issue for the district court, the court of appeals appeared to carefully and correctly determine that neither of Philbrook's proposed accommodations would cause even the de minimis cost necessary for a finding of undue hardship under *Hardison.*[6] Accordingly, the great protection on the "undue hardship" provision of Title VII affords employers from the expense and inconvenience of accommodating employee religious observances means that employers, including the Board of Education in this case, will not suffer any significant difficulty from ordinarily being required to implement the accommodation which least penalizes an employee in a case in which bilateral cooperation has not resulted in a settlement, the employer does not suffer undue hardship and special circumstances do not warrant a different solution. Thus, the court of appeals properly interpreted the religious accommodation provisions of Title VII under the facts of this case.[7]

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[5] Indeed, the dissenters in *Hardison* feared that this Court's construction of undue hardship was so broad that it impaired the religious freedom in employment protected by Title VII. *Hardison,* 432 U.S. at 86-87, 96-97 (Marshall, J., dissenting).

[6] The court of appeals' analysis appears clearly correct on the issue of the absence of undue hardship to the Board of Education occasioned by permitting Philbrook to pay the cost of a substitute actually utilized as his replacement. This payment would relieve the Board of Education of the financial cost of a substitute and would not appear to pose greater than de minimis cost. *See, Philbrook,* 757 F.2d at 486. The question of undue hardship occasioned by personal leave usage appears closer, but the court of appeals' reasoning still appears sound. *See* 757 F.2d at 485.

[7] In light of the flexibility provided employers by Title VII's "reasonable accommodation" and "undue hardship" provisions it is clear that the statute, as interpreted by the court of appeals, does not constitute the absolute elevation of a particular religious interest over all secular interests which this Court considered to have the primary effect of advancing religion. *Compare Estate of Thornton v. Caldor, Inc.,* 105 S. Ct. 2914, 2917

CONCLUSION

The decision of the court of appeals should be affirmed.

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(1985). *See Estate of Thornton,* 105 S. Ct. at 2919 (O'Connor, concurring) (Title VII's provisions for the reasonable accommodation of religion are consistent with the Establishment Clause because they protect all religious observances and are legitimately viewed as anti-discrimination laws protecting employment opportunities for all groups); *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 90 n.4 (1977) (Marshall, J., dissenting) (Title VII's provisions for the reasonable accommodation of religion are consistent with the Establishment Clause since their purpose and primary effect is the secular one of securing equal employment opportunities to members of minority religions).